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THE INCIDENCE OF RENT.

ALL who read Professor Langdell's article on Real Obligations, published in June last in the pages of this REVIEW,[1] must have been vividly impressed by his brilliant summary of the law of rent. Especially, I think, must this have been the case with his English readers; for in this country, owing to the great depression which has taken place of late years in the value of agricultural land, the liability of landowners to pay rents charged on their lands has become a very serious burden, and owners of rent charges have in several recent cases been driven to assert their remedy by action. I think that a short account of the decisions in these cases may be of interest to the American readers of this REVIEW; especially as I gather, from Professor Langdell's omission to mention them, that they are not recognized as authorities in any of the United States. At the same time I will venture, though with much diffidence, respectfully to make a criticism upon Professor Langdell's theory of the nature of the rent.

To commence with my criticism. Professor Langdell says:[2] "There are in English law two real obligations in particular, which are always principal obligations, namely, rent and predial tithe. In each of these the property bound is land; and yet in each it is not the *corpus* of the land, but its fruits, or the income produced by it, that is bound. Each, therefore, according to the nomenclature of the law of Scotland, is a *debitum fructuum*, not a *debitum*

[1] Vol. X. p. 71.

[2] 10 HARVARD LAW REVIEW, 78.

fundi. Hence each is payable periodically; and hence also, *when a payment becomes due, it becomes a personal obligation of the occupier of the land,*[1] who has received the fruits out of which the rent or tithe in question was payable." Again he lays down[2] "that the owner of a rent of any kind is entitled to have the same paid, *if the income of the land out of which it issues is sufficient to pay it,*[3] and that it does not lie in the mouth of the tenant of the land to say that the income is insufficient." And further on, he criticises the decision in Cupit *v.* Jackson[4] that a court of equity has jurisdiction to decree that arrears of rent shall be raised by sale or mortgage of the land charged therewith, on the ground that a rent is not in its nature a charge upon the *corpus* of the land out of which it issues, but merely upon its fruits and income; and when a court of equity gives relief upon the foundation of a legal right, it cannot extend its relief beyond the legal right. Lastly, in discussing the liability of a landowner to be made personally liable in equity to pay a rent charged on his land,[5] Professor Langdell asserts that, if his liability be only by reason of his being the assignee of the term on the creation of which the rent was reserved, *or the grantee of the estate out of which the rent was granted, his liability will begin only when the assignment or grant was made to him,*[6] and will continue only so long as the term or estate remains vested in him.

Now I fully understand that professor Langdell's object was, not to enter into the history of rent, but merely to give a brief summary of the law of rent as applicable at the present day in those States of the Union where the law is founded upon the principles of English common law and equity. And in so far as his article is to be regarded as a statement of the law now obtaining in those States, it would be the greatest impertinence for me to take exception to anything he has said. When I learn from his article, for instance,[7] that in some States the law of distress for rent has never been adopted, and that in Pennsylvania the statute of *Quia Emptores* has never been in force, I recognize at once that "most excellent differences" have arisen between the laws of England and the United States as regards land and rent, and I accept his exposition of the laws of the Union with the faith due to an

[1] The Italics are mine.
[2] 10 HARVARD LAW REVIEW, 94.
[3] The Italics are mine.
[4] 13 Price, 74.
[5] 10 HARVARD LAW REVIEW, 94.
[6] The Italics are mine.
[7] 10 HARVARD LAW REVIEW, 84, 88.

expert. But after all, in the passages I have quoted, the writer professes to summarize the principles of the common law, without giving any hint that, in respect to rent, the common law obtaining in the United States is different from the common law of England. If, therefore, (and I say if, for Touchstone's[1] reasons, though indeed I have no fear that an interest in the principles of our common law could be anything but a link of friendship between my American legal brethren and myself,) — if, I say, Professor Langdell meant to state the common law as obtaining in England, I will venture to break a lance with him, and to maintain that by the common law of England rent is regarded as a charge upon the land out of which it issues, and not upon the income or profits of the land.

In support of this proposition, I would point out, first, that all rent is modelled upon rent service, of which rents charged and rents seck were but a more or less perfect imitation; and that the perfect type of rent is, not the rent service reserved upon a lease for years, but that reserved under the old common law before the statute of *Quia Emptores*, upon the grant of a fee. Now *rent* service of this kind is but one of the many services which were the incidents of feudal tenure, and such services were a burden on the tenement into whosesoever hands it might come. The common law view is that the land granted in fee is bound to render the services by which it is held,[2] through the hand of the terre-tenant for the time being; and to enforce this obligation (which, I entirely agree, is a real obligation) the law gave to the lord, to whom the services were due, the remedy of distress, that is, of seizing the chattels found on the tenement, not to satisfy the services, but in order to exact their performance.[3] The purely coercive nature of distress for rent service at common law is shown by the fact that the chattels distrained could not be sold to satisfy the amount due, nor used, nor kept for use; they could only be detained as a pledge

[1] I allude to Shakespeare's, not Sheppard's Touchstone.

[2] See Bac. Abr., Rent (K 2).

[3] It is well shown how service due from a tenant to his lord was "a burden on the tenement, a service due from the tenement" in Pollock and Maitland, Hist. Eng. Law, I. 215 *seq.* When we find that it might be said that hides and virgates must send men to the war, reap and mow, do suit of court, or carry the King's writs whenever they come into the county, we see plainly that it was well understood that services were a charge on the land. The lord's remedies by distress and otherwise for enforcing his services are also carefully explained in the same work, I. 333–335, II. 124 *seq.*, 573–576. The nature of rents is examined, II. 128 *seq.*, where they are described as being charged on the land out of which they issue.

for payment. The whole object of distress was to realize *specifically* the services charged on the land. In the case of rent service, it was a process to make the land pay the rent due therefrom, payment being necessarily by the tenant's hand. Distress was never a means of exacting *compensation* for failure to render the services charged on the land until the statute 2 Will. & Mary, c. 5, altered the whole character of the remedy by enabling the chattels distrained to be sold, and the amount of rent due to be paid out of the proceeds of sale.[1] The common law never gave any process to recover rent out of the income or profits of the land, out of which the rent issued. Indeed, as at common law, "nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken," [2] the fruits of the land, such as growing crops, corn in sheaves, hay in cocks, and fruit, were originally privileged from distress.[3] Would not this be strange if rent were a *debitum fructuum?*

I submit that the following considerations also show that rent is a charge on the land, out of which it issues: — First, at common law, *all* chattels found on the land, no matter whose they were, might as a rule be distrained for rent. Secondly, in the case of a rent in fee, the common law imposed no duty of payment upon the terre-tenant. It was no injury to the rent owner that the tenant appropriated the whole of the rents and profits to his own use; and mere nonpayment by him of the rent was not an actionable wrong. Thirdly, any tenant of land, out of which a rent service or rent charge issued, might always be distrained to pay all arrears of the rent, whether accrued due during his tenancy *or before it.* Fourthly, in a writ of entry to recover a freehold rent the whole of the arrears might be recovered against the tenant of the land, out of which the rent issued, not only the arrears accrued during his tenancy, but also those previously accrued. And fifthly, in a suit in equity to recover a rent, a defendant claiming to keep possession of the land, out of which the rent issued, might be decreed personally to pay arrears of rent accrued before the commencement of his tenancy. To prove these statements I cite the following authorities.

As to No. 1, it is sufficient to refer to Co. Litt. 47 b, and notes (2, 3), and 3 Black. Comm. 9, 10. What I think is the significant

[1] Co. Litt. 47; 3 Black. Comm. 6–14.
[2] Co. Litt. 47 a.
[3] 3 Black. Comm. 9, 10.

fact is that it is the *locality*, not the ownership of chattels, which at common law determined their liability to be distrained for rent.

As to No. 2, if arrears of a rent in fee were due and unpaid, and the rent owner died without having used any remedy to recover them, the arrears were lost at common law, neither his executors or administrators nor his heir or devisee having any remedy by distress or action to recover them.[1] The law was altered in this respect by stat. 32 Hen. VIII. c. 37, s. 1, which gave to such executors or administrators an action of debt for such arrears against the tenant or tenants that ought to have paid the rent in the deceased rent owner's lifetime, or against such tenant's executors or administrators; and further provided that it should be lawful for such executors or administrators to distrain for such arrears upon the lands charged with the payment of such rent and chargeable to the late rent owners' distress, so long as the said lands continued in the seisin of the said tenant in demesne, who ought to have paid the rent to the late rent owner in his life, or of any other person or persons claiming the said lands from the said tenant by purchase, gift, or descent, in like manner as the late rent owner might or ought to have done in his lifetime. But it was agreed,[2] after this statute, that if A had a rent service or rent charge in fee or for life, and the rent were in arrear, and afterwards A granted the rent over to another, and the tenant attorned and then A died, the arrears were lost; because the Act gave no remedy when the rent owner by his own act dispensed with the arrears, but only when the arrears were due to him at the time of death, and by the act of God became remediless. Again, if a rent in fee (whether rent service, rent charge, or rent seck) were in arrear and were afterwards extinguished, even by act of law, the arrears were lost, according to the common law,[3] and were not recoverable in an action of debt, because in such case the rent was purely a real thing, that is to say, a charge upon the land only and not on the person of the terre-tenant. It is true that in the cases of rent

[1] Ognel's Case, 4 Rep. 48 b, 49 b; Co. Litt. 162 a.

[2] Ognel's Case, 4 Rep. 50 b; Dixon *v.* Harrison, Vaughan, 36, 40, 41.

[3] See Ognel's Case, 4 Rep. 49, and Fitz. Abr., Executors, 71, there cited. In the case of rent service in fee Coke says, "The lord himself could by no possibility have an action of debt for the arrears, for the tenure was all in the realty." In the case of a rent charge in fee, if the grantee elected to charge the person of the grantor (where he might do so) in a writ of annuity the land was discharged of the rent; so that in this case also, the rent, as such, was all in the realty; see Litt. ss. 219–221, and Coke thereon; Pollock and Maitland, Hist. Eng. Law, II. 130.

service reserved on a lease for life and of rent granted for life, arrears of rent were recoverable, after the death of the lessee or grantee for life, in an action of debt. But the reason which Lord Coke gives for this distinction is that the creation of such rents amounts "to a real contract in law, which realty, when the estate of freehold is determined, dissolves itself into personalty."[1] What he meant by this, as I understand, was that on the creation of such rents there arose, not only a principal obligation of a real nature, charging the land, but also a secondary obligation (like that of a surety) charging the person of the terre-tenant, not as a matter of contract, but in respect of his tenancy of the land.[2] In such cases, therefore, it seems that there was a personal obligation on the terre-tenant to pay the rent, so that nonpayment was a good cause of personal action against him. The remedy on this cause of action, was, however, suspended during the continuance of the freehold in the rent, because, so long as the rent existed as a real thing, the personal obligation of the terre-tenant was eclipsed by the superior dignity of the freehold charge on the land.[3]

So long as there remained a freehold estate in the rent, the land, as we have seen,[4] was the principal debtor, and nonpayment of the rent was not an effective cause of action, without the rent were legally demanded.[5] And the essential part of a legal demand of rent was to make it *on* the land, and if no one were there, to make it *of* the land, as the principal debtor.[6] But when the freehold ended, the personal obligation imposed as above mentioned on the tenant still remained, though the real obligation, on the

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[1] Ognel's Case, 4 Rep. 49 a; and see Fitz. Abr., Debt, 180.

[2] I think that this is well shown by Mountague, C. J., in Kidnelly *v.* Brand, Plowd. 70, 71: "If a man makes a lease for life or years, rendering rent at such a feast, and that if it be in arrear he shall enter, there the lessor ought to come to the land and demand the rent, or else he shall never enter, for the rent is only payable upon the land, and the land is the debtor, for in assise for the rent the land shall be put in view, and he shall distrain on the land for the rent, so that *the land is the principal debtor, and the person of the lessee is no debtor but in respect of the land.*"

[3] See Y. B. 19 Hen. VI. 28, 29, pl. 49, per Paston; Webb *v.* Jiggs, 4 M. & S. 113.

[4] *Ante*, p. 3.

[5] The principal cause of disseisin of a rent charge or rent seck was denial of the rent, that is, nonpayment of the rent after it had been legally demanded; see Litt. ss. 233–240, and Coke thereon, especially 153 b, 161 b; Bredman's Case, 6 Rep. 56; Maund's Case, 7 Rep. 28 b; Bishop *v.* Grant, Cro. Eliz. 324; Speccot *v.* Sheres, ib. 828; Smith *v.* Smith, Cro. Car. 507; Morrice *v.* Prince, ib. 520; Cranley *v.* Kingswell, Hob. 207. Denial, however, was no cause of disseisin of a rent service without rescous or resistance. Y. B. 40 Edw. III. 24, pl. 25; Co. Litt. 161 a.

[6] Plowd. 70, 71; Co. Litt. 201 b; and see the cases cited in the previous note.

land, was dissolved; and so the arrears (if any) were recoverable in an action of debt.[1] Rent service reserved on a lease for years was recoverable in debt during the continuance of the lease, because such a lease, creating a chattel interest only, was merely a matter of personal contract. In this case, therefore, a personal obligation to pay the rent was laid on the tenant; and this could always be enforced, as there was no freehold of which the superior dignity would eclipse it.[2] But, as we have seen,[3] in the case of a rent in fee, debt could never be maintainable at common law for any arrears; for the land was, not merely the principal, but the only debtor.[4] In later time, a remedy in equity was allowed against the executors of a terre-tenant, who had omitted to keep down a rent charged on his land; but in granting this remedy it was expressly recognized that the terre-tenant was not liable to pay the rent at common law. Thus in Eton Coll. *v.* Beauchamp & Riggs,[5] where a bill in equity was filed by the grantee of a rent against the terre-tenant and the executor of a deceased terre-tenant, the executor was decreed to pay the arrears, so far as he had assets; but the reason given for this decision was that, *though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress*, yet, forasmuch as the testatrix held the land and did not pay the rent, her personal estate was thereby augmented.

As to No. 3, Edrich's case,[6] Pasch. 1 Jac. I., in replevin, on the last clause of the above mentioned stat. 32 Hen. VIII. c. 27, s. 1,

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[1] Ognel's Case, 4 Rep. 49. And in Lillington's Case, 7 Rep. 38 b, "it was also resolved that, if a man grants a rent charge for life out of his land, and the rent is behind; and the grantor enfeoffs A, and the rent is behind in his time; and afterwards A enfeoffs B, and the rent is behind in his time; and afterwards the grantee dies, his executors shall have an action of debt against each of them for the rent behind in his time."

[2] It was held that debt might be brought for rent on a lease for years without any demand; Dene's Case, 1 Roll. 216; and arrears of such rent were not lost by assignment of the reversion, "for the contract remains, though the privity of estate is gone;" Midgley *v.* Lovelace, Carth. 289.

[3] *Ante*, p. 5.

[4] In the case of rent service in fee, the tenant would never be charged personally, either in writ of annuity or in debt. Fitz. Abr., Annuity, 52; Co. Litt. 144 a, b, 145 a; Roll. Abr. 226 (Annuity, C); Bac. Abr., Rent (K 2); 4 Rep. 49. In the case of a rent charge in fee, the tenant could only be charged personally by the rent owner's electing to sue for an annuity, which was an abandonment of the charge on the land. See note 3 to p. 5, above.

[5] Hil. 20 and 21 Car. II., 2 Ch. Ca. 121, cited as law in 2 Wms. Ex'rs, Pt. IV. Bk. II. ch. 1. s. 1, p. 1722, 7th ed.

[6] 5 Rep. 118.

was as follows. A seised in fee of land held in socage devised a rent with clause of distress to B for the life of C and died. A's heir leased the land charged to D for life, remainder to E in fee. The rent was behind for divers years in the life of D. D died, then C died, then B distrained the remainderman (E) for all the arrearages incurred in the life of D. It was adjudged that the remainderman was charged with these arrears by the statute. And it was said that "in the principal case *all the land was charged with the rent*, and the heir held all his estate charged with it; and when he made the lease for life, the remainder in fee, he in remainder was chargeable, and in this case might have been distrained by the common law for the arrearages; but by the act of God, by the death of C, D" (an obvious error for B) "was prevented; which prevention the said last part of the said statute has supplied and remedied in this case, giving the grantee power to distrain, as if *cestui que vie* had been alive."

As to No. 4, in Y. B. 40 Edw. III. 24, pl. 25, it was held that arrears of rent service were charged on the land and recoverable in an assise against the tenant of the land for the time being. And in Y. B. 33 Hen. VI. 46, pl. 30,[1] there is a note that it was held by some justices and sergeants in a writ of trespass that in assise[2] of rent the plaintiff shall recover against the defendant, notwithstanding that the defendant were in of the land[3] but one month, and if the rent were in arrear for twenty years he shall recover against the defendant all the arrearages incurred to him.

As to No. 5, in Zouch *v.* Siddenham, 22 Eliz.,[4] an heir in tail was ordered in chancery to pay a rent reserved on the grant to his ancestor, and afterwards granted over so as to become rent seck; and it seems that he was ordered to pay some arrears accrued in his ancestor's time. In Boteler *v.* Massey (1675),[5] a rent in fee reserved on a sale in the ninth year of Henry VIII. had been paid till 1652. In 1675 it was refused to be paid, and the plaintiff, the heir of the grantee of the rent, having lost his deeds so that he could not recover at law, brought his bill in equity for the arrears. The defendant pleaded purchase for valuable consideration with-

[1] Abridged, Bro. Abr., Arrearages, pl. 13, Assise, pl. 10, Damages, pl. 10; Vin. Abr., Rent (Q b) 1.

[2] Viner rightly explains this to mean "in writ of entry in the nature of assise of rent."

[3] The printed Year Book says "of the rent;" but this is an obvious error, and is so treated by Brooke and Viner.

[4] Cary, 131.

[5] Finch, 241.

out notice, and enjoyment for thirty years without demand. Yet he was decreed to pay the arrears by the Master of the Rolls with interest, but by the Lord Chancellor without interest on account of the plaintiff's delay. And in Busby *v.* Salisbury (1676),[1] the plaintiff, as treasurer of Salisbury Cathedral and parson of Marlock, sued the defendant for £5 per annum, payable formerly by the Abbess of Lyon out of part of tithes belonging to the Rectory of Marlock, vested in the Crown on the dissolution of abbeys, and granted out again and forming part of the Salisbury estates, which rent was formerly paid by the defendant's ancestors to the plaintiff's predecessors till the late usurpation. But the defendant conceiving that in those tumultuous times many of the writings were lost, (as in truth they were) had for fourteen years past denied the payment thereof. The defendant pleaded that he claimed the premises as a purchaser under his marriage settlement; but the court decreed the arrears and future payments to the plaintiff forever. What is remarkable in the last two cases is the disregard of the plea of purchase for value without notice. This shows that in giving relief as to rent and its arrears, a court of equity regards itself as enforcing a legal charge on the land, out of which the rent issues. And the decrees made against the terre-tenant personally for payment of the rent and its arrears[2] should be referred, I submit, not to any personal liability on his part at law, but to the simple principle that, if the owner of land charged with the payment of money wish to keep the land, he must pay the money. The case, I think, is exactly parallel to that of one who has succeeded to land subject to a mortgage debt, which he is not personally liable to pay. He cannot be sued for the debt at law; but if he wish to avoid foreclosure, he must pay out of his own pocket all that is due, including arrears of interest which accrued due before he succeeded to the land.

The decision in Cupit *v.* Jackson,[3] that a court of equity might, if necessary, raise the arrears of a rent charge out of the estate by sale or mortgage, was expressly rested on the ground that the rent in question was a charge and an encumbrance on the real estate itself. I submit that the law is correctly stated in the reason so given. Cupit *v.* Jackson has been followed in this country in

[1] Finch, 256.

[2] See the decrees made in Duke of Leeds *v.* Powell, 1 Ves. 171, 172, and Suppl't, p. 98; Duke of Leeds *v.* Corporation of New Radnor, 2 Bro. C. C. 338, 518.

[3] 13 Price, 721, 737.

several cases, which are all collected in Hambro *v.* Hambro,[1] the latest of them. In that case it was strenuously argued that a rent charge was not a charge on the *corpus* of the land, out of which it issued, without express words to make it so. North, J., held it necessary to decide that exact point, but he reviewed all the cases in which the doctrine of Cupit *v.* Jackson had been discussed, showed that that doctrine had been applied to rents issuing out of land in the ordinary way, and not otherwise expressly charged in the inheritance, and came to the conclusion that the court had jurisdiction, in its discretion, to order the arrears of a rent charge to be raised by sale or mortgage of the land. If at law rent be a charge on the land out of which it issues, Professor Langdell's criticism [2] of Cupit *v.* Jackson loses its point. He has another objection to the doctrine of this case, that it is inappropriate to the case of annual payments which may be perpetual.[3] But if, to speak metaphorically, the rent owner has a charge on the goose, and not merely on the golden eggs, he is within his rights in trying to realize something by killing the goose when the golden eggs are no longer forthcoming. If he choose to forego the chance of having more eggs in future, that is his lookout, and as the remedy given by Cupit *v.* Jackson is discretionary, the court will take care that it is not exercised oppressively as regards the terre-tenant.

Next, I may mention that Professor Langdell, in arguing that one reason [4] allowed for giving relief in equity to an owner of rent would seem to justify the granting of such relief to a rent owner who has no right to distrain, says that there seems to be no authority directly upon the point.[5] But in Cary, p. 7, it is said, "Where a man made title to a rent seck of which there was no seisin, nor for which he had any action at the common law and prayed help here, it was denied upon conference had by the Lord Keeper with the judges, Mich. 1596." [6] Again, in Palmer *v.* Whittenhal,[7] where a bill was brought for payment of a rent of

[1] 1894, 2 Ch. 564. [2] *Ante*, p. 2. [3] 10 HARVARD LAW REVIEW, 93.

[4] Uncertainty of the rent owner, through loss of deeds or like reason, as to the kind of rent he has, so that he cannot distrain.

[5] 10 HARVARD LAW REVIEW, 92, 93.

[6] This agrees with Lord Coke's observation that, without seisin, the grantee of a rent seck "hath not any remedy either at the common law *or in any court of equity*." Co. Litt. 159 b.

[7] 1 Ch. Cas. 184. In this case also a plea of purchase for value without notice was treated as irrelevant.

which the plaintiff had been seised by receiving payment from the defendant's predecessors in title, a demurrer was allowed on the ground that, as it appeared by the bill that the plaintiff had had seisin, he might bring his assise at law; and it was said that, if there had not been a seisin, all the relief this court would have given would be but to give seisin. And there is other authority that if the owner of a rent charge has an effectual remedy at law, he will not be relieved in equity without good reason.[1] It seems likely, however, that Professor Langdell is speaking of proceedings in equity to recover a rent given without power of distress, and not recoverable by action, because an assise of rent is no longer maintainable. If the legal remedy by action be taken away, the case would certainly seem to fall within the principle on which relief has been allowed in equity. This brings me to consideration of the English cases mentioned at the beginning of this paper. For in this country, since the abolition of real and mixed actions to recover rent, a new remedy has been allowed to the rent owner by personal action against the terre-tenant at law. I will state the decisions establishing this in order of time.

In Thomas *v.* Sylvester[2] it was held that, since the abolition of real and mixed actions by statute 3 & 4 Will. IV. c. 27, s. 36, a personal action will lie against a tenant of land for the recovery of a rent charge *in fee* issuing out of the land. This was decided on the supposition that the case was analogous to the recovery of arrears of a rent for life, after the life had dropped, in an action of debt at common law. The judges[3] based their decision upon the proposition that at common law debt would lie for the arrears of a freehold rent charge (generally) when the freehold came to an end, as otherwise there would be no remedy. Although it is evident that they had Ognel's Case[4] open before them, they did not advert to the distinction most plainly pointed out there between rents in fee and for life, or to the reason given by Lord Coke for allowing debt for arrears an extinguished life rent.[5] And it does not appear to have been brought to the notice of the court that, at common law, debt could never lie for the arrears of a rent in fee, even after it had been extinguished by act of law.[6]

[1] Holder *v.* Chambury, 3 P. W. 255; Duke of Leeds *v.* Powell, 1 Ves. 171, 172; Bouverie *v.* Prentice, 1 Bro. C. C. 200; Cupit *v.* Jackson, 13 Price, 731.

[2] L. R. 8 Q. B. 368.

[3] Blackburn, Quain, and Archibald.

[4] 4 Rep. 48 b.

[5] See p. 6, above.

[6] See p. 5, above.

In Whitaker *v.* Forbes,[1] the declaration was by the executor of A, stating that B had devised all her lands to the defendant for life charged with an annuity of £500 to A during the joint lives of A and the defendant, and that the defendant had entered into possession of the lands at B's death, but had not paid the annuity; and the venue was laid in Middlesex. On demurrer to a plea that the land in question was situate beyond seas, to wit, in Australia, it was held that in such an action the venue was local, and it could not be maintained in England, because the defendant's liability arose from privity of estate, and not from privity of contract. Thomas *v.* Sylvester[2] was referred to by Brett, J., in Whitaker *v.* Forbes,[3] as "an authority for saying that when the statute got rid of real and mixed actions *the same remedy* would lie for arrears of the rent charge during the continuance of the estate (*sc.* the freehold in the rent), as after its determination." And Denman and Lindley, JJ., also referred to Thomas *v.* Sylvester as an authority that an action of debt might be brought during the continuance of such a rent as had been created in Whitaker *v.* Forbes.[3] In the latter case, however, the rent was for life only, and again the judges seem to have been quite unaware that debt never lay to recover the arrears of a rent in fee, after the determination of the freehold estate in the rent.

In Christie *v.* Barker,[4] where a rent charge had been granted by a private Act of Parliament to a vicar and his successors, who were by the Act to have the same remedies as are given by law for the recovery of rent in arrear, the tenant of part of the lands charged was held personally liable to pay the whole of the arrears of the rent charge upon the authority of Thomas *v.* Sylvester.[5] Brett, M. R., expounded the doctrine of Thomas *v.* Sylvester at considerable length; but the sum of what he said was this. When rent was payable to a freeholder's landlord, a debt became due to him from the tenant;[6] so long as the rent was recoverable in an assise, the inferior remedy of an action of debt was suspended; but debt was maintainable when the superior remedy no longer existed; Thomas *v.* Sylvester decided that, as the superior remedy had been taken

[1] L. R. 10 C. P. 583; 1 C. P. D. 51.
[2] L. R. 8 Q. B. 368.
[3] L. R. 10 C. P. 583, 585.
[4] 53 L. J. Q. B. 537.
[5] The same point had been previously decided in Booth *v.* Smith, 51 L. T. N. S. 395.
[6] As regards lord and tenant of a fee, the M. R. was entirely mistaken in this, as we have seen, *ante* pp. 5, 7.

away by statute, the inferior remedy was maintainable during the continuance of the freehold. Bowen, L. J., laid down law to the same effect,[1] saying, "The rule at common law is that an action of debt is merged in the higher remedy, but where the higher remedy is taken away, the action of debt still remains." He also remarked that, if the rent owner were aggrieved by denial of the tenant of payment of the rent, he had his remedy *not only against that person*, but also against the whole of the land out of which the rent issued. And both judges were apparently still quite unaware that debt was never maintainable at common law for the arrears of a rent in fee. Their decision that the tenant of part of the land was liable for arrears of the whole rent seems to have been based on the considerations that the rent issued out of every part of the land; that the Act gave the vicar the right to maintain such an assise for rent as was maintainable for rent service, and the remedy given by Thomas *v.* Sylvester was in lieu of this assise. But the court overlooked the fact that mere denial of the rent was no cause of action to recover rent service.[2] And it is to be noted

[1] In this case, Bowen, L. J., also said, "In an assise of novel disseisin, if the case of the demandant" (I presume he meant the plaintiff) "was made out, *he was restored to the actual possession of the land until the rent was paid.*" This seems to be a mistake, as in an assise of rent the plaintiff did not recover seisin of the land charged, but only seisin of his rent. The plaintiff was entitled to the same judgment and writ of execution (*habere facias seisinam*), as in an assise of land; but in an assise of rent, the writ "was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in the case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin with all its consequences." Grant *v.* Ellis, 9 M. & W. 113, 123. If after the plaintiff had been so put in seisin of his rent, the *arrears* were not paid, it seems that his remedy was by *scire facias* upon his judgment. Thus in Vin. Abr., Debt (N), pl. 12, translating Bro. Abr., Dette, 212 (citing 23 Hen. VIII.), it is said: "Where a man recovers in writ of annuity or assise, or has avowry for rent, which is frank tenement, and recovers the arrears without costs and damages, he shall not have action of debt of it, but *scire facias*, for it is real; but when he has judgment of it with costs and damages which goes together, so that it be mixed with the personalty, then lies writ of debt: — note the diversity." And it seems further that, upon a judgment against the defendant in *scire facias* so brought against him he would be *personally* liable. Thus in Barnard and Tusser's Case, 4 Leon. 184, pl. 287, Wray, C. J., said, "If in a *scire facias* to have execution of an annuity the plaintiff hath judgment, upon such judgment he shall have an action for debt." If so, one may conjecture that such a judgment would be enforceable by *ca. sa.*, *fi. fa.*, or *elegit*. This point, however, is very obscure; and it seems impossible that these writs could have issued upon the original judgment, when that was properly executed by a writ of *habere facias seisinam*. See 3 Black. Comm. 412 *seq.* As to *scire facias* being the proper process to make the terre-tenant personally liable for the arrears of rent, see further Fitz. Abr., Scire facias, 100, 110, 130; Bro. Abr., Annuity, 17; Vin. Abr., Execution (Q a 3), Scire facias (D 1).

[2] *Ante*, pl. 6, n. 5.

that, according to the law laid down in Brediman's Case,[1] forasmuch as a rent charge or a rent seck is against common right, in an assise thereof, *all* the terre-tenants ought to be named as parties. So that the decision in Christie *v.* Barker is no authority for the proposition that an action of debt will lie, according to the doctrine of Thomas *v.* Sylvester, for the whole arrears of a *rent charge* against the tenant of part only of the land out of which the rent issues.

In re Blackburn, &c. Building Society *ex parte* Graham,[2] an unregistered company was mortgagee in possession of land subject to a rent charge in fee created by deed. The company was wound up under the 203d section of the Companies Act, 1862, and the liquidators for some time paid the rent charge. Then, finding that the annual value of the property was not equal to the rent charge, they obtained leave from the court to get rid of the land, and gave notice to the tenant in occupation of the land and to the owner of the rent charge that they repudiated the land. The owner of the rent charge claimed to prove in the winding up for arrears which had accrued since the repudiation; but it was held by the Court of Appeal that the company were only liable so long as they were owners of the land, that the liquidators had sufficiently repudiated the ownership of the land, and that no subsequent claim could be made for the rent charge. Lord Esher, M. R., said:[3] "It was contended on the authority of Thomas *v.* Sylvester that the claim could be made, because the liability for the rent charge was a debt. But that case did not decide anything of the sort. All that was decided in that case was that it was a claim arising out of an interest which a tenant has in the possession of land and in the profits of the land at the time when the rent charge became due. It was so far a right in respect of the enjoyment of the land, that, before the passing of the Common Law Procedure Act,[4] it was the subject of a real action which was not brought on contract, but on a right arising out of the land; and it was held that when real actions were abolished another remedy, namely an action of debt, was left, otherwise the owner of the rent charge would be left without any legal remedy."

[1] 6 Rep. 58 b, F. N. B. 178 d, which was actually cited in Christie *v.* Barker, is to the same effect.

[2] 42 Ch. D. 343.

[3] Page 346.

[4] This is an obvious slip for the Act of Will. IV., abolishing real actions.

In Searle *v.* Cooke,[1] an action was brought in the Chancery Division by the assignee of a rent charge in fee, which had been created upon the enfranchisement of certain copyholds under the Copyhold Act, 1852, at the instance of the lord, against the tenant of the enfranchised land and his mortgagees, both to recover arrears of the rent charge and to have the boundaries of the land charged determined. Kay, J., after referring to the cases which establish that a rent owner shall have relief in equity where the lands charged or the boundaries thereof are uncertain, said :[2] "With respect to the arrears of the rent charges, Thomas *v.* Sylvester and Christie *v.* Barker seem to be distinct authorities that an action of debt may be maintained for these arrears; but, if not, under the equitable jurisdiction of the court, an order must be made for payment in accordance with the cases to which I have referred. In the Court of Appeal the judgment was affirmed, Cotton, L. J., saying :[3] "It is said that an action cannot be brought for payment of arrears of a rent charge. It was, however, decided by Thomas *v.* Sylvester, and I think rightly decided, that such an action could be brought. In former times, when real actions could be brought, a personal action for debt for payment of a rent charge did not lie, but now that such actions are abolished all the judges in that case laid down the right of the person entitled to a rent charge to bring an action for debt against the tenant in possession of the land."

In Pertwee *v.* Townsend,[4] the tenant of land charged with a rent payable to a vicar and his successors was held by Collins, J.,[5] to be personally liable to pay the whole of the rent, although the annual profits of the land were insufficient to satisfy the amount of the rent. This was based partly on the ground that, in an assise to recover the rent at common law, the whole of the rent could have been recovered against the tenant, irrespective of the amount of the profits of the land, and partly on the supposition that the point was involved in the decision in Christie *v.* Barker.

In *Re* Herbage Rents, Greenwich,[6] Stirling, J., held that a tenant for years is not liable to be sued in an action founded on Thomas *v.* Sylvester, for arrears of a rent in fee charged on his land. This was decided on the ground that, at common law, such a rent (in so

[1] 43 Ch. D. 519.
[2] 43 Ch. D. 528.
[3] Page 532.
[4] 1896, 2 Q. B. 129.
[5] Following Swift *v.* Kelly, 24 L. R. Ir. 107, in preference to Odlum *v.* Thompson, 31 L. R. Ir. 394.
[6] 1896, 2 Ch. 811.

far as it was recoverable by action and not by distress) could only be recovered in an action brought against the freeholder. Numerous authorities are cited in the judgment; but the reasons above stated for the decision in Thomas *v.* Sylvester are repeated and accepted.

Now Thomas *v.* Sylvester may be good law, in so far as it decided that the terre-tenant is personally liable to pay a rent for life; because, in the case of a rent for life, nonpayment of the rent was a cause of action of debt at common law, and the remedy on this cause of action was merely suspended during the continuance of the freehold in the rent.[1] But as to the point actually decided therein, it is submitted that Thomas *v.* Sylvester is open to the criticism that the analogy relied on as the ground of decision wholly fails, nonpayment of a rent in fee being no cause of action of debt at common law.[2] It appears therefore that in this case an action was held to lie, under the reformed procedure introduced by the Common Law Procedure Act, 1852, upon a state of facts which afforded no cause of action against the defendant at common law. Such a conclusion, however, seems to be inconsistent with the recent case of Companhia de Moçambique *v.* British South Africa Co.,[3] in which the House of Lords held that the English courts have no jurisdiction, under the Judicature Acts of 1873 to 1875, to entertain an action for trespass to land beyond the seas, because such a trespass gave rise to no cause of action at common law.[4] It was there plainly laid down that the test of obtaining relief in our English courts, now that the old formal actions have been abolished, is whether the plaintiff has a good cause of action. In Thomas *v.* Sylvester, it has been shown that the plaintiff had no cause of personal action; and he could have no cause of real or mixed action, because such remedies for the recovery of rent had been expressly abolished by statute without any saving.[5] On

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[1] See *ante*, pp. 6, 7.

[2] See *ante*, p. 5.

[3] 1893, App. Cas. 602.

[4] The plaintiffs urged that the abolition of venue by the Judicature Acts rendered such an action maintainable; but the court held that, as regards land beyond the seas, the rule of common law requiring the venue to be local in trespass *quare clausum fregit* was substantive and not merely procedural.

[5] By Stat. 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions were abolished, except writ of right of dower, writ of dower *unde nihil habet*, *quare impedit*, and ejectment. But ejectment could never be brought to recover a rent. Cro. Car. 492; 3 Black. Comm. 206; 2 Tidd's Practice, 1193, 9th ed.; Cole on Ejectment, 91.

what ground, then, could he be liable? It does not appear sufficient to say that otherwise there would be no remedy. When a statute takes away an action, the liability is removed. Acts which before were actionable no longer constitute a cause of action; a state of facts that formerly gave rise to an obligation is not now productive of any legal bond. It is therefore submitted that the courts have no jurisdiction to impose directly, under the present procedure, that personal liability to pay a rent in fee, which at common law could only be fixed on the terre-tenant in case of his contempt of the judgment in a real or mixed action to recover the rent;[1] as it is exactly that liability which the Act of Will. IV. removed.[2]

T. Cyprian Williams.

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[1] See *ante*, p. 13.

[2] To put a parallel case. By the Statute of Gloucester, 6 Edw. I. c. 5, waste by a tenant for life was a cause of forfeiture of the place wasted, in case a writ of waste were issued against him. Afterwards a tenant for life was held to be liable in damages for waste in an action on the case; 2 Wms. Saund. 252, n. (7). This duplicate liability continued until 1833, when the writ of waste was abolished by Stat. 3 & 4 Will. IV. c. 27, s. 35; see 3 Steph. Comm. 532, n. (p), 6th ed. Could it be seriously argued that the courts have jurisdiction, since that enactment, to impose in any form of proceeding the liability to forfeiture for waste, which could only be enforced before by suing out a writ of waste?